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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SAFeway INC.,; WALGREEN CO.,; THE
KROGER CO.,; NEW ALBERTSON'S, INC.,;
AMERICAN SALES COMPANY, INC.,; and
HEB GROCERY COMPANY, LP,

Plaintiff,

vs.

ABBOTT LABORATORIES,

Defendant.

Case No. C 07-5470 (CW)

*Related per October 31, 2007 Order to
Case No. C-04-1511 (CW)*

**PLAINTIFFS' OPPOSITION TO
ABBOTT'S OMNIBUS MOTION TO
DISMISS**

Date: March 6, 2008

Time: 2:00 p.m.

Courtroom: 2 (4th Floor)

Judge: Hon. Claudia Wilken

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1 SMITHKLINE BEECHAM CORPORATION)
d/b/a/ GLAXOSMITHKLINE,)

2)
3 Plaintiff,)

4 vs.)

5 ABBOTT LABORATORIES,)

6 Defendant.)

Case No. C 07-5702 (CW)

*Related per November 19, 2007 Order to
Case No. C-04-1511 (CW)*

**PLAINTIFFS' OPPOSITION TO
ABBOTT'S OMNIBUS MOTION TO
DISMISS**

Date: March 6, 2008

Time: 2:00 p.m.

Courtroom: 2 (4th Floor)

Judge: Hon. Claudia Wilken

9 MEIJER, INC. & MEIJER DISTRIBUTION,)
INC., on behalf of themselves and all others)
10 similarly situated,)

11 Plaintiffs,)

12 vs.)

13 ABBOTT LABORATORIES,)

14 Defendant.)

Case No. C 07-5985 (CW)

*Related per November 30, 2007 Order to
Case No. C-04-1511 (CW)*

**PLAINTIFFS' OPPOSITION TO
ABBOTT'S OMNIBUS MOTION TO
DISMISS**

Date: March 6, 2008

Time: 2:00 p.m.

Courtroom: 2 (4th Floor)

Judge: Hon. Claudia Wilken

16 ROCHESTER DRUG CO-OPERATIVE,)
17 INC., on behalf of itself and all others similarly)
18 situated,)

19 Plaintiff,)

20 vs.)

21 ABBOTT LABORATORIES,)

22 Defendant.)

Case No. C 07-6010 (CW)

*Related per December 3, 2007 Order to
Case No. C-04-1511 (CW)*

**PLAINTIFFS' OPPOSITION TO
ABBOTT'S OMNIBUS MOTION TO
DISMISS**

Date: March 6, 2008

Time: 2:00 p.m.

Courtroom: 2 (4th Floor)

Judge: Hon. Claudia Wilken

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27)
28 [caption continues next page]

1 LOUISIANA WHOLESALE DRUG
2 COMPANY, INC., on behalf of itself and all
others similarly situated,

3 Plaintiff,

4 vs.

5 ABBOTT LABORATORIES,

6 Defendant.

8 RITE AID CORPORATION; RITE AID
9 HDQTRS, CORP.,; JCG (PJC) USA, LLC;
MAXI DRUG, INC. d/b/a BROOKS
10 PHARMACY; ECKERD CORPORATION;
CVS PHARMACY, INC.; and CAREMARK,
11 L.L.C.,

12 Plaintiff,

13 vs.

14 ABBOTT LABORATORIES,

15 Defendant.

) **Case No. C 07-6118 (CW)**

) *Related per December 10, 2007 Order to*
) *Case No. C-04-1511 (CW)*

) **PLAINTIFFS' OPPOSITION TO**
) **ABBOTT'S OMNIBUS MOTION TO**
) **DISMISS**

) **Date: March 6, 2008**

) **Time: 2:00 p.m.**

) **Courtroom: 2 (4th Floor)**

) **Judge: Hon. Claudia Wilken**

) **Case No. C 07-6120 (CW)**

) *Related per December 5, 2007 Order to*
) *Case No. C-04-1511 (CW)*

) **PLAINTIFFS' OPPOSITION TO**
) **ABBOTT'S OMNIBUS MOTION TO**
) **DISMISS**

) **Date: March 6, 2008**

) **Time: 2:00 p.m.**

) **Courtroom: 2 (4th Floor)**

) **Judge: Hon. Claudia Wilken**

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19 **UNREDACTED VERSION**
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INTRODUCTION

This is the fourth time since 2004 that Abbott Laboratories (“Abbott”) has moved to dismiss the antitrust claims filed in this Court regarding its conduct in the boosted protease inhibitor (“boosted PI”) market (the “Norvir cases”). Discovery is complete in two of the earlier-filed Norvir cases (*Doe* and *SEIU*), and trial is only months away. Related cases have recently been filed against Abbott by other purchasers of Norvir (including Safeway, Rite Aid, and a consolidated proposed class action on behalf of all direct purchasers by Meijer, Inc., Meijer Distribution, Inc., Rochester Drug Cooperative, Inc., and Louisiana Wholesale Drug Co., Inc.), and a competitor of Abbott (GlaxoSmithKline (“GSK”)) (collectively, the “Plaintiffs” in the “newly-filed cases”). Pursuant to the Court’s direction, the plaintiffs in the newly-filed cases submit this joint opposition to the Omnibus Motion of Abbott Laboratories to Dismiss Plaintiffs’ Sherman Act Claims Pursuant to Rule 12(b)(6) (“Motion”).

Abbott bases its latest attempt to avoid antitrust scrutiny of its massive Norvir price hike and other anticompetitive conduct solely on a Ninth Circuit decision, *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007), *as amended by* Nos. 05-35627 et al., --- F.3d ---, 2008 WL 269506 (9th Cir. Feb. 1, 2008) (“*Cascade*”). Significantly, *Cascade* begins its analysis of the “bundled discounting” issue in that case with the statement that the Supreme Court has instructed lower courts to be cautious in condemning “discounted prices” because “price cutting is a practice the antitrust laws aim to promote.” *Id.* at *6. Despite the obvious fact that Abbott’s massive price hike here can hardly be termed “price cutting,” Abbott claims that this Court should use *Cascade* to reject at the pleading stage each of the theories of liability alleged by the plaintiffs in the newly-filed cases.¹

While *Cascade* is a recent decision, it does not enunciate any new law that would apply to the Norvir cases (earlier- or newly-filed). Instead, *Cascade* merely clarifies the law of this Circuit as to “when bundled discounts constitute the exclusionary conduct proscribed by § 2.” *Id.* at *12.

¹ Abbott also has raised this argument in its motion for summary judgment filed February 13, 2008 in the related *Doe/SEIU* action. Plaintiffs respectfully suggest that the briefing in the *Doe/SEIU* action may further illuminate why *Cascade* does not apply to shield Abbott’s conduct.

1 *Cascade* holds that, to prove anticompetitive conduct in a bundled discount case, the plaintiff must
 2 establish that, “after allocating the discount given by the defendant on the entire bundle of
 3 products to the competitive product or products, the defendant sold the competitive product or
 4 products below its average variable cost of producing them.” *Id.* at *18. In so ruling, the *Cascade*
 5 court rejected a jury instruction based on the more lenient bundled discounting test set forth in
 6 *LePage’s, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc). 2008 WL 269506, at *7-12.

7 *Cascade* is irrelevant here because the crux of Abbott’s anticompetitive conduct involves a
 8 massive price hike, and thus plaintiffs have not alleged that Abbott engaged in bundled
 9 discounting and are not relying on the *LePage’s* test for when bundled discounting constitutes
 10 anticompetitive conduct. Moreover and tellingly, until all its other (and presumably better)
 11 arguments in support of dismissal were repeatedly rejected, Abbott never had suggested that
 12 bundled discount analysis applies to the facts of this case. Indeed, its economic expert has opined
 13 recently the exact opposite: **“Abbott does not offer bundled discounts. Nor is Abbott’s**
 14 **pricing structure equivalent to a bundled discount.”** Request for Judicial Notice (filed
 15 herewith), Ex. 1 (Rebuttal Expert Report of Joel W. Hay, Ph.D.) at 30, ¶ 42; *see also id.* at 18, ¶ 17
 16 and 28, ¶ 39.

17 For this reason (and others), this Court has not relied upon allegations or evidence of
 18 bundled discounts in its several opinions denying Abbott’s motions to dismiss or for entry of
 19 summary judgment. *In re Abbott Labs. Norvir Anti-Trust Litig.*, 442 F. Supp. 2d 800, 807 (N.D.
 20 Cal. 2006) (denying motion for summary judgment); *Doe v. Abbott Labs.*, No. C 04-1511 CW
 21 (Docket # 63), at 4-6 (N.D. Cal. Oct. 21, 2004) (Order Denying Defendant’s Motion to Dismiss
 22 First Amended Class Action Complaint) (“2004 Denial of Motion to Dismiss (Docket # 63)”);
 23 *Service Employees Int’l Union Health & Welfare Fund v. Abbott Labs.*, No. C 04-4203 CW
 24 (Docket # 44), at 6-7 (N.D. Cal. Mar. 2, 2005) (Order Denying Defendant’s Motion to Dismiss)
 25 (“2005 Denial of Motion to Dismiss (Docket # 44)”). Abbott nowhere explains the fundamental
 26 discrepancy between the instant Motion (flatly claiming that Abbott engaged in bundled
 27 discounting) and the report of its expert economist (flatly claiming that Abbott did *not* engage in
 28 bundled discounting) – nor could Abbott reasonably or credibly do so.

1 Try as it might, Abbott simply cannot turn allegations concerning its 400 percent price
 2 increase into a claim that its conduct constitutes a form of “discounting” that should be evaluated
 3 under *Cascade*, a decision whose key concern was that judicial scrutiny not stifle actual
 4 discounting. *Cascade* and the line of cases upon which it relies address a form of price cutting –
 5 *not* a price increase that happens to have made other unchanged prices look low by comparison.
 6 Just because some of the challenged conduct in these cases involves pricing does not make these
 7 predatory pricing cases, and does not bring this conduct within the rubric of bundled discounts.
 8 The conduct at issue here was intended by Abbott to make Norvir essentially unavailable to large
 9 segments of the market in order to impair the ability of its rivals to compete in the boosted PI
 10 market and stifle competition in that market. There are other antitrust theories for analyzing that
 11 kind of conduct. *Cascade* is inapposite.

12 Plaintiffs in all of the Norvir cases allege monopolization and attempted monopolization of
 13 the boosted PI market. In the earlier-filed Norvir cases, this Court already has held that plaintiffs
 14 allege and present a material issue of fact as to whether Abbott’s conduct was anticompetitive
 15 monopoly leveraging under *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th
 16 Cir. 1997) (“*Kodak*”).² The allegations in the newly-filed Norvir cases mirror in this respect those
 17 in the earlier filed cases. The newly-filed Norvir cases also contain allegations of anticompetitive
 18 conduct under a number of different theories besides the monopoly leveraging theory sustained in
 19 *Kodak*. None of those theories involves below-cost pricing, and each independently would require
 20 denial of Abbott’s motion to dismiss. Given that *Kodak* applies here, and that Abbott does not
 21 even argue that *Cascade* reverses or amends *Kodak*, *Cascade* cannot as a matter of logic justify or
 22 ground a dismissal of this case. Put another way, *Cascade* can only be a problem for plaintiffs
 23 here if it means that below-cost pricing is a prerequisite to a finding of any anticompetitive
 24 conduct. That is, Abbott can only succeed if it can show that so long as pricing is above cost,

25
 26 ² The “monopoly leveraging” that was held to constitute exclusionary conduct in *Kodak*
 27 and under which this Court has held that plaintiffs have alleged exclusionary conduct is the use of
 28 monopoly power in one market to gain a monopoly or a dangerous probability of monopoly in a
 second market. Bundled discounting can be a way of using predatory pricing to leverage a
 monopoly, but not all monopoly leveraging cases are predatory pricing cases, and most predatory
 pricing cases involve one product in one market.

1 there can be no Sherman Act liability under *Kodak* or any other theory. But, that is not the
 2 holding of *Cascade* (or any other case). *Cascade* does not erase a hundred years of antitrust law
 3 and replace it with a rule that the existence of above-cost prices immunizes a defendant against all
 4 conceivable claims that it engaged in anticompetitive conduct.

5 Abbott's latest arguments are a desperate attempt to avoid being held to account for its
 6 anticompetitive conduct. These arguments are as flawed as the earlier contentions that this Court
 7 has repeatedly rejected (or more so), and they deserve the same fate.³

8 ARGUMENT

9 I. ABBOTT'S MOTION SHOULD BE DENIED BECAUSE *CASCADE* DOES NOT 10 APPLY TO THESE CASES.

11 A. *Cascade* Issued a Narrow Holding Applicable Only to One Category of 12 Anticompetitive Conduct: Bundled Discounting.

13 The *Cascade* court's holding was limited to one particular category of potentially
 14 anticompetitive conduct: discount bundling. In *Cascade*, the parties, McKenzie and PeaceHealth,
 15 were the only two providers of hospital care in Lane County, Oregon. 2008 WL 269506, at *3.
 16 PeaceHealth offered substantial discounts to customers who agreed exclusively to use PeaceHealth
 17 for various health care services, some of which McKenzie did not provide. *Id.* at *3-4. McKenzie
 18 sued PeaceHealth for monopolization, attempted monopolization and tying under sections 1 and 2
 19 of the Sherman Act and for violation of Oregon's anti-price discrimination law. *Id.* at *2.
 20 McKenzie based its claims on a number of theories, including bundled discounting, exclusive
 21 dealing, and tying. *Id.* at *2-4. The district court granted PeaceHealth's motion for summary
 22 judgment on McKenzie's tying theory, but allowed McKenzie to go to trial on its other theories.
 23 *Id.* at *4. After a trial in which McKenzie's primary theory of anticompetitive conduct was
 24 PeaceHealth's bundled discounting, the jury found in favor of McKenzie, concluding that

25 ³ Abbott filed separate motions to dismiss the Sherman Act claims in both the GSK case
 26 and the consolidated direct purchaser case (the "Meijer action"). In the GSK case, Abbott relies
 27 upon its planned "patent immunity" defense. In the Meijer action, Abbott takes issue with the
 28 alternative pleading that the *Cascade* test can be met here and with allegations that Abbott
 improperly monopolized the boosting market (as well as the boosted market). Both GSK and the
 Meijer action plaintiffs are submitting separate memoranda that demonstrate why those motions
 should be denied.

1 PeaceHealth had violated section 2 and Oregon's anti-price discrimination law. *Id.* Both parties
 2 appealed. *Id.* at *5. The Ninth Circuit vacated the jury verdict on the monopolization and
 3 attempted monopolization claims and the order granting summary judgment in favor of
 4 PeaceHealth on the tying claim. *Id.* at *19, 22, 24. It then remanded for further proceedings on all
 5 of these claims.⁴ *Id.*

6 *Cascade* dealt primarily with McKenzie's bundled discount theory of anticompetitive
 7 conduct. It first described the practice at issue: "A bundled discount, however else it might be
 8 viewed, is a price discount on a collection of goods." 2008 WL 269506, at * 12. Then, after a
 9 lengthy analysis of that practice, it concluded:

10 In summary, we hold the following: To prove that a bundled discount was
 11 exclusionary or predatory for the purposes of a monopolization or attempted
 12 monopolization claim under § 2 of the Sherman Act, the plaintiff must establish
 13 that, after allocating the discount given by the defendant on the entire bundle of
 14 products to the competitive product or products, the defendant sold the
 15 competitive product or products below its average variable cost of producing
 16 them.

17 *Id.* at *18. The Ninth Circuit did not address PeaceHealth's arguments concerning other theories
 18 of anticompetitive conduct that McKenzie had put forward as a basis for liability on its
 19 monopolization and attempted monopolization claims.⁵ The court also expressly refused to apply

20 ⁴ Initially, the Ninth Circuit also vacated the jury verdict in favor of McKenzie on the
 21 Oregon price discrimination claim. On February 1, 2008, the Ninth Circuit amended the opinion
 22 filed on September 4, 2007, 502 F.3d 895 (9th Cir. 2007), *as amended by* 2008 WL 269506 (9th
 23 Cir. Feb. 1, 2008). In the original opinion, the court held that the price discrimination judgment
 24 was subject to the same cost-based test as the bundled discounting claim. 502 F.3d at 922-25. The
 25 amended opinion altered that conclusion, finding that the validity of the jury instruction regarding
 price discrimination "rests upon an unsettled question of Oregon antitrust law," 2008 WL 269506,
 at *19, and certifying the question to the Oregon Supreme Court. *Id.*; *Cascade Health Solutions v.*
PeaceHealth, Nos. 05-35627 et al., --- F.3d ----, 2008 WL 269475 (9th Cir. Feb. 1, 2008) (order
 certifying question).

26 ⁵ The plaintiff in *Cascade* actually alleged several different types of anticompetitive
 27 conduct, only one of which was discount bundling (the others included physician referrals, sole
 28 provider status, and various acquisitions). *See McKenzie-Williamette Hosp. v. PeaceHealth*, 2003
 WL 23537980 (D. Or. Aug. 15, 2003). At trial, the court instructed the jury to consider four types
 of anticompetitive conduct in support of its attempted monopolization claim (exclusive contracts,
 pricing practices, physician contract arrangements, and restrictive real estate covenants), but *the*
plaintiff attributed its damages solely to "exclusive dealing induced by bundled discounts."

1 this test outside the bundled pricing context. *Id.* at *22 n.27. Significantly, in a portion of its
 2 ruling simply ignored by Abbott, the *Cascade* court reversed summary judgment for defendant on
 3 plaintiff's tying claims, holding that under a tying theory the pricing scheme could be
 4 anticompetitive even if above-cost. *Id.* at *19-22.

5 Thus, *Cascade* teaches that each theory put forward in a Sherman Act case must be
 6 analyzed independently based on the facts alleged. As Abbott has admitted and this Court has
 7 recognized, none of the plaintiffs is alleging price discounting – just the opposite: plaintiffs here
 8 allege Abbott engaged in a massive price increase in order to hinder rivals and harm competition
 9 in the boosted PI market. The mere fact that, like PeaceHealth, Abbott is leveraging its power
 10 from one market into another does not require application of the below-cost test set forth in
 11 *Cascade*. Indeed, tying claims involve exactly the same leveraging of power from one market to
 12 another, and the *Cascade* court refused to read below-cost limitations into tying claims. *Cascade's*
 13 narrow holding concerning discount bundling simply does not apply to the allegations in these
 14 cases.

15 **B. Because These Cases Involve Abbott's Massive Price Increase – Not Bundled**
 16 **Discounting – the Rationale for a Bright Line Rule Set Forth in *Cascade* Does**
 17 **Not Apply Here.**

18 Moreover, *Cascade's* holding, applicable to cases in which a plaintiff bases its claim of
 19 anticompetitive conduct on bundled price discounting, should not be imported into a case
 20 involving exactly the opposite conduct – a price hike. *Cascade* adopted a bright line rule,
 21 requiring a plaintiff alleging anticompetitive price discounting to prove a form of below-cost
 22 pricing, because price reductions typically benefit consumers. The same concerns and the same
 23

24 _____
 25 Request for Judicial Notice, Ex. 6 (Opening Brief of Appellant PeaceHealth, 2005 WL 35117798
 26 at 53, in *Cascade Health Solutions v. PeaceHealth*, No. 05-35640, 2008 WL 269506 (9th Cir. Feb.
 27 1, 2008). On appeal, PeaceHealth argued that the "Other Alleged Anticompetitive Conduct" – the
 28 physician arrangements and the restrictive covenants – was not anticompetitive under section 2.
Id. at 21-57. PeaceHealth also argued on appeal that unless its conduct violated section 1 of the
 Sherman Act that conduct could not violate section 2. 2008 WL 269506 at *19 n.22. The Ninth
 Circuit invited amicus briefing solely on the bundled discount issue. *Cascade Health Solutions v.*
PeaceHealth, 479 F.3d 726, 727 (2007). Its opinion did not address either of the other arguments
 made by PeaceHealth.

1 rationale are obviously not applicable here, where Abbott has harmed consumers by exponentially
2 increasing their costs.

3 The *Cascade* court made abundantly clear that the desire not to subject price cutting to
4 excessive judicial scrutiny drove its holding. It acknowledged that “the Supreme Court has
5 instructed that, because of the benefits that flow to consumers from discounted prices, price
6 cutting is a practice the antitrust laws aim to promote.” *Cascade*, 2008 WL 269506, at *6. It
7 quoted *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993), in
8 which the Supreme Court set a bright line cost-based test for assessing the legality of discounting
9 of a single product, for the proposition that “[l]ow prices benefit consumers regardless of how
10 those prices are set, and so long as they are above predatory levels, they do not threaten
11 competition.” 2008 WL 269506, at *10 (internal quotation marks omitted, alteration in original).
12 It further noted that Supreme Court decisions “show a measured concern to leave unhampered
13 pricing practices that might benefit consumers, absent the clearest showing that an injury to the
14 competitive process will result.” *Id.* at *12.

15 The Ninth Circuit’s opinion in *Cascade* uses the terms “discount,” “discounting,” “lower
16 prices,” “price cutting,” “price competition” and the like **163** times. Raising prices is the antithesis
17 of price competition. Yet Abbott’s motion is fundamentally an attempt to convince the Court that
18 the antitrust laws are incapable of distinguishing between a 400 percent **increase** in the price of
19 Norvir and a comparable **decrease** in the price of Kaletra. This is Abbott in Wonderland.

20 The distinction between raising the price of Norvir and reducing the price of Kaletra is in
21 fact a distinction that appears on the face of plaintiffs’ complaints. In the *Safeway* complaint, for
22 example, plaintiffs allege: “Faced with the prospect of new competition to Kaletra, Abbott’s
23 boosted PI, Abbott declined to engage in legal and procompetitive approaches to defending
24 Kaletra’s market share (*such as reducing Kaletra’s price*).” *Safeway Amended Complaint* ¶ 22
25 (emphasis added). Had Abbott lowered the price of Kaletra in December 2003 rather than
26 increasing the price of Norvir, these cases would never have been filed.

27 By its Omnibus motion, Abbott seeks to persuade this Court that its 400 percent price hike
28 is worthy of the same kind of deference as a presumptively pro-consumer price reduction. It is

1 not. In *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), for example, the
 2 Court refused to adopt a series of *per se* rules that would have absolved Kodak of liability prior to
 3 meaningful discovery or trial. Kodak urged the Court to hold that, as a matter of law, there cannot
 4 be separate markets for sales and service, *id.* at 463, and that a lack of power in the primary market
 5 necessarily precludes power in the aftermarkets, *id.* at 465-66. Like Abbott here, Kodak
 6 contended “that there is no need to examine the facts,” citing to case law involving price-cutting in
 7 which the Court had affirmed a grant of summary judgment to defendants. *Id.* at 467-68, 467.
 8 The Court distinguished price-cutting cases from the facts presented to it:

9 Nor are we persuaded by Kodak’s contention that it is entitled to a legal
 10 presumption on the lack of market power because, as in *Matsushita [Electric*
 11 *Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)], there is a significant
 12 risk of deterring procompetitive conduct. Plaintiffs in *Matsushita* attempted to
 13 prove the antitrust conspiracy “through the evidence of rebates and other price-
 14 cutting activities.” Because cutting prices to increase business is “the very essence
 15 of competition,” the Court was concerned that mistaken inferences would be
 16 “especially costly” and would “chill the very conduct the antitrust laws are
 17 designed to protect.” But the facts in this case are just the opposite. The alleged
 18 conduct – higher service prices and market foreclosure – is facially
 19 anticompetitive and exactly the harm that antitrust laws aim to prevent.

20 504 U.S. at 478 (internal citations omitted). Like Kodak, Abbott cannot avoid antitrust scrutiny of
 21 its massive price hike and other anticompetitive conduct on the ground that such scrutiny might
 22 deter pro-consumer price discounting. None of Abbott’s conduct, alleged by plaintiffs, can be
 23 characterized as pro-consumer.⁶

24 _____
 25 ⁶ In any case, plaintiffs’ complaints sufficiently state a claim even if *Cascade* applies. The
 26 *Cascade* decision came after an appeal from a jury verdict. Abbott, by contrast, is moving to
 27 dismiss antitrust claims based on the pleadings. As recently stated by the United States Supreme
 Court in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (reversing dismissal), Abbott has a very
 difficult burden:

28 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement
 of the claim showing that the pleader is entitled to relief.” Specific facts are not
 necessary; the statement need only “give the defendant fair notice of what the . . .

C. Abbott's Effort to Apply *Cascade* to This Case Should Be Rejected Because This Court and Abbott Have Recognized That Discount Bundling, and Thus Implicitly *Cascade* Itself, Have No Relevance to This Case.

Abbott's invocation of *Cascade* is an effort to recycle its argument that, despite its massive price increase on Norvir, this case is about low prices, an argument this Court has rejected several times. *See* 2004 Denial of Motion to Dismiss (Docket # 63), at 7-8, 9 (describing Abbott's argument). This Court already has made clear that the law regarding the competitive effects of low-pricing does not apply to the facts alleged in the Norvir cases. For example, this Court has recognized that:

- Plaintiffs' injury is "distinguishable" from the injuries complained of in cases where "the injury was alleged to have arisen from a *decrease* in prices in the relevant market." *Id.* at 9 (emphasis in original).
- Plaintiffs allege that they were "injured in the relevant marketplace by having to pay *artificially inflated* prices for Norvir for its use in conjunction with other PIs." 2005 Denial of Motion to Dismiss (Docket # 44), at 5-6 (emphasis added).
- Plaintiffs in the earlier filed Norvir cases presented evidence sufficient to get before a jury on the question of whether Abbott's inflated price for Norvir harmed competition: "Plaintiffs provide their expert's finding that Defendant's price increase harms HIV patients by creating another barrier to entry that hinders the introduction of new PIs from Defendant's competitors, and, therefore, provide evidence of antitrust injury." 442 F. Supp. 2d at 807 (denying motion for summary judgment).

claim is and the grounds upon which it rests.'" [quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007)].

Erickson, 127 S. Ct. at 2200 (alteration in original); *see also Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832 (9th Cir. 2007) (citing *Erickson* and *Twombly*, reversing district court decision that the complaint was inadequate). To survive a motion to dismiss, plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1974. This Court previously concluded that the Norvir antitrust cases meet this test. *Cascade* does not alter that result.

1 Tellingly, Abbott itself has acknowledged, repeatedly, that antitrust theories stemming
 2 from discounting and low-pricing theories do not apply here. For example, only a couple of
 3 months ago after the Ninth Circuit's decision in *Cascade*, Abbott's economist opined that bundled
 4 pricing theories **have no application here**:

5 In the case of Abbott, a bundled discount would require that Abbott provide a
 6 significant discount on Norvir contingent on the patient also purchasing lopinavir.

7 However, Abbott does not offer such discounts on Norvir for patients that
 8 purchase lopinavir. Nor does it sell lopinavir as a stand-alone PI.

9 Request for Judicial Notice, Ex. 1, at 18, ¶ 17. Abbott's economist further stated that bundled
 10 discount and tying theories "are completely inapplicable to Abbott." *Id.* at 28, ¶ 39. "[T]his
 11 theory of monopoly leveraging [bundled discounts] does not fit Abbott's pricing. As discussed
 12 above, **Abbott does not offer bundled discounts. Nor is Abbott's pricing structure equivalent**
 13 **to a bundled discount.**" *Id.* at 30, ¶ 42 (emphasis added).

14 Abbott's own briefs to this Court have reiterated this same point. Abbott has complained
 15 that plaintiffs are not relying on "recognized" or "traditional" theories of anticompetitive conduct,
 16 such as predatory pricing. Request for Judicial Notice, Ex. 2 (Notice of Motion and Renewed
 17 Motion of Abbott Laboratories' for Summary Judgment, Jan. 9, 2006) at 16; *see id.*, Ex. 4 (Abbott
 18 Laboratories' Opposition to Plaintiffs' Rule 56(f) Motion, July 1, 2005) at 11. It has characterized
 19 plaintiffs' injury as "being forced to pay more because of a price increase." *Id.*, Ex. 2, at 17. High
 20 prices, Abbott argued, are an antitrust problem only if they are preceded by anticompetitive
 21 conduct "such as through predatory pricing But that is not what Plaintiffs are alleging. They
 22 are alleging only that they are paying more because of Abbott's unilateral decision to raise the
 23 price of a patented product." *Id.*, Ex. 2 at 18. Indeed, Abbott has staked its fate in the Norvir
 24 litigation on its entitlement, as a patentee, to charge as high a price as it likes. "[S]etting high
 25 prices" is how a "monopolist can permissibly benefit from its position." *Id.*, Ex. 5 (Notice of
 26 Motion and Motion of Abbott Laboratories' for Summary Judgment, June 1, 2005) at 19 (internal
 27
 28

1 quotation marks and citation omitted). It is far too late for Abbott to pretend that the Norvir cases
 2 are about price discounting.⁷

3 **II. THIS COURT’S PRIOR HOLDING THAT PLAINTIFFS HAVE ADEQUATELY**
 4 **ALLEGED ANTICOMPETITIVE CONDUCT APPLIES EQUALLY TO THE**
 5 **NEWLY-FILED NORVIR CASES.**

6 **A. The Newly Filed Norvir Cases Adequately Allege Monopoly Leveraging.**

7 This Court repeatedly has ruled that plaintiffs in the earlier-filed Norvir cases have not
 8 only pleaded sufficient allegations, but also have presented evidence raising material issues of fact
 9 regarding each element of their section 2 claims, including the element of anticompetitive conduct.
 10 In its opinions noted below, this Court has found:

- 11 • “Plaintiffs’ complaint alleges that Defendant has used its monopoly in one market (the
 12 booster market) in order to achieve an anticompetitive purpose in a separate market
 13 (the boosted market). In *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125
 14 F.3d 1195, 1216 (9th Cir. 1997), the court noted that ‘a monopolist who acquires a
 15 dominant position in one market through patents or copyrights may violate § 2 if the
 16 monopolist exploits that dominant position to enhance a monopoly in another market.’
 17 ... ‘Neither the aims of the intellectual property law, nor the antitrust laws justify
 18 allowing a monopolist to rely upon a pretextual business justification to mask
 19

20 ⁷ Abbott’s characterization of plaintiffs’ allegations as directed at Abbott’s supposed “price
 21 discounting” is based on its extraction from the complaints of the statement that “Norvir is sold at
 22 a much lower price when used as one component of Abbott’s own boosted PI, Kaletra.” Motion at
 23 4. It is improper to attempt to segregate plaintiffs’ individual allegations from the overall
 24 allegations. “[I]t would not be proper to focus on specific individual acts of an accused
 25 monopolist while refusing to consider their overall combined effect. . . . We are not dealing with a
 26 mathematical equation. We are dealing with what has been called the ‘synergistic effect’ of the
 27 mixture of the elements.” *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir.
 28 1992). In this case, the plaintiffs allege a series of actions, including inducing competitors to rely
 on Norvir, taking money from its competitors in exchange for licenses, drastically raising the price
 of Norvir to stifle competition for Kaletra, not changing the price of Kaletra and then misleading
 the public about the reasons for its actions. Abbott’s “arguments unfairly parse” these allegations
 into allegations of price increases and relative price discounts. See *Visa U.S.A. Inc. v. First Data*
Corp., 2006 WL 1310448, at *11 (N.D. Cal. May 12, 2006) (denying motion for summary
 judgment). “Parties ‘should be given the full benefit of their proof without tightly
 compartmentalizing the various factual components and wiping the slate clean after scrutiny of
 each.’” *Id.* at *11 (citation omitted). “Each claimed fact is not a separate cause of action for
 antitrust violation, but, taken together the allegations amount to valid claims.” *Id.*

1 anticompetitive conduct.’ *Id.* at 1219. The successful ‘monopoly leveraging theory’
 2 relied upon by the plaintiffs in *Image Technical*, [*i*]d. at 1208, is the theory Plaintiffs
 3 assert in their amended complaint to trigger Sherman Act liability.” 2004 Denial of
 4 Motion to Dismiss (Docket # 63), at 5-6.

- 5 • “Plaintiff has adequately alleged, under the monopoly leveraging theory, which the
 6 plaintiffs in *Doe* relied upon and that was recognized by the Ninth Circuit in [*Kodak*],
 7 that Defendant’s actions trigger Sherman Act liability.” 2005 Denial of Motion to
 8 Dismiss (Docket # 44), at 7.
- 9 • “Plaintiffs are entitled to discovery relating to the issue of whether Defendant’s Norvir
 10 price increase was a pretext for anti-competitive conduct in the boosted market. . . .
 11 *Image Technical* is binding on this Court.” *In re Abbott Labs. Norvir Anti-Trust Litig.*,
 12 C 04-1511 CW (Docket # 146) and C 04-4203 CW, at 7 (N.D. Cal. Sept. 12, 2005)
 13 (Order Granting Plaintiffs’ Rule 56(f) Motion and Denying as Premature Defendant’s
 14 Motion for Summary Judgment) (“Order Granting Rule 56(f) Motion”).
- 15 • “Plaintiffs allege, relying on the monopoly leveraging theory recognized in *Image*
 16 *Technical*, 125 F.3d at 1208, that, while Defendant holds patents in the booster market,
 17 Defendant’s Norvir price increase constituted impermissible anti-competitive conduct
 18 in the boosted market.... Plaintiffs provide evidence that Defendant abused its patent
 19 rights to Norvir to maintain its monopoly in the boosted market.” 442 F. Supp. 2d at
 20 807 (denying defendant’s motion for summary judgment).

21 The allegations on which the Court relied are repeated in the newly-filed Norvir cases. For
 22 example,

- 23 • “Abbott’s specific actions in furtherance of its anticompetitive purpose and scheme
 24 include leveraging its market power in the market for PI boosters into the market for
 25 boosted PIs” GSK Complaint ¶ 58; Meijer Consolidated Amended Complaint
 26 ¶ 18.
- 27 • “Abbott’s December 3, 2003 price increase was an attempt to leverage its monopoly
 28 position in the boosting market in order to disadvantage competitors and maintain its

dominant position in the boosted market.” Safeway Complaint ¶ 23; Rite Aid Complaint ¶ 33; *see also* Meijer Consolidated Amended Complaint ¶¶ 24, 25.

- Abbott’s “executives formulated an anticompetitive scheme using Abbott’s control of Norvir as leverage to maintain or increase Kaletra’s dominant market position.” GSK Complaint ¶ 24; *see* Rite Aid Complaint ¶ 21; Safeway Complaint ¶ 22; Meijer Consolidated Amended Complaint ¶ 25.
- “Abbott has leveraged its monopoly position (100% dominance) in the Boosting Market to impede rivals to Abbott’s Kaletra product in the Boosted Market.” Meijer Consolidated Amended Complaint ¶ 18.

B. Kodak Still Applies to Abbott’s Conduct.

In spite of these allegations and the Court’s numerous rulings, Abbott tries once again to reargue that *Kodak* has no application to the Norvir cases. Abbott is mistaken.

1. Plaintiffs Allege Conduct Proscribed by *Kodak*.

First, Abbott argues a point it has repeatedly lost in this Court, rehashing its contention that *Kodak* does not apply because *Kodak* is supposedly a refusal to deal case, and Abbott has not refused to deal. As this Court has already held, *Kodak* is not so limited. *In re Abbott Labs. Norvir Anti-Trust Litig.*, 442 F. Supp. 2d at 807. “Section 2 of the Sherman Act prohibits a monopolist’s unilateral action, like *Kodak*’s refusal to deal, if that conduct harms the competitive process in the absence of a legitimate business justification.” *Kodak*, 125 F.3d at 1209. “[W]e believe the Supreme Court, in *Aspen Skiing*, endorsed a more general application of § 2 principles to refusal to deal cases.” *Id.* at 1211. The Ninth Circuit approved a jury instruction that is the basis for the liability the Norvir plaintiffs allege: “It is unlawful, however, for a monopolist to engage in conduct, including refusals to deal, *that unnecessarily excludes or handicaps competitors in order to maintain a monopoly.*” *Id.* at 1209 (emphasis in original). The theory and the instruction refer to refusals to deal simply as an example of the conduct prohibited; they do not indicate that the only kind of exclusionary conduct prohibited is a refusal to deal.

Moreover, while Abbott may not have engaged in an outright refusal to deal, there need not be an outright refusal to deal for conduct such as that alleged here to be found exclusionary

1 under Section 2. For example, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585
 2 (1985), did not involve an absolute refusal to deal. Rather, the defendant ski resort was willing to
 3 continue to offer a combined all-mountain ticket including the plaintiff's resort, but only under
 4 terms that were considerably less favorable than the plaintiff had received from the defendant in
 5 the past. *Id.* at 592. The plaintiff claimed that the defendant had made the plaintiff "an offer that
 6 [it] could not accept." *Id.* Other courts routinely analyze exclusionary price increases under the
 7 test set out in *Aspen Skiing*. See, e.g., *Metronet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132
 8 (9th Cir. 2004) (evaluating conduct under *Aspen Skiing* even though there was a willingness to
 9 provide the product on undesirable terms; "[a]n offer to deal with a competitor only on
 10 unreasonable terms and conditions can amount to a practical refusal to deal."); see also *Delaware*
 11 *& Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179-80 (2d Cir. 1990) (conduct need not
 12 be an outright refusal to deal in order to find a denial of an essential facility); *Nobody in*
 13 *Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1112 (D. Colo.
 14 2004) (significant price increase constituted a denial of an essential facility). As these cases show,
 15 high prices can constitute unlawful exclusionary conduct akin to a refusal to deal.

16 The newly-filed Norvir cases cite Abbott documents released by *The Wall Street Journal*
 17 demonstrating that Abbott understood its price increase as a means of making Norvir essentially
 18 inaccessible to a wide array of patients in order to impair the sales of Abbott's rivals in the
 19 boosted PI market. Abbott considered different ways of pulling Norvir from the market in order to
 20 decrease demand for its competitors' PIs, including offering only a liquid form of Norvir that
 21 Abbott's own executives admit "taste[s] like someone else's vomit," raising the price to an
 22 exorbitant level, and discontinuing it altogether. GSK Complaint ¶¶ 25-28; see Rite Aid
 23 Complaint ¶¶ 24-25; Meijer Consolidated Amended Complaint ¶¶ 21, 28-30. The decision to raise
 24 the price rather than pull the product or the pill version from the market was based on public
 25 relations concerns, specifically, how Abbott could hide its motivations (could it convincingly cite
 26 increased demand for Norvir tablets in Africa? GSK Complaint ¶ 27; Rite Aid Complaint ¶ 25;
 27 Meijer Consolidated Amended Complaint ¶ 29), "minimize any federal investigations," GSK
 28 Complaint ¶ 26; Rite Aid Complaint ¶ 22; Meijer Consolidated Amended Complaint ¶ 26, and

1 avoid the perception that it was a “big, bad, greedy pharmaceutical company” that lacked a
 2 commitment to HIV, GSK Complaint ¶ 28; Rite Aid Complaint ¶ 22; Meijer Consolidated
 3 Amended Complaint ¶ 26. Abbott intended for its conduct to impair its rivals as if it were a refusal
 4 to deal.⁸

5 2. Ninth Circuit, Not Federal Circuit, Law Applies Here.

6 Finally, and somewhat ironically in a brief inspired almost entirely by the supposed
 7 applicability of a recent Ninth Circuit decision, Abbott argues that *Kodak* has been rejected by the
 8 Federal Circuit, whose law, Abbott contends, controls. Abbott has made this argument—which its
 9 own argument regarding *Cascade* contradicts—at least four times already, and the Court has
 10 properly rejected it each time:

11 Defendant argues that Plaintiffs’ pretext argument is irrelevant because the Court
 12 is bound, not by *Image Technical*, but by *In re Indep. Servs. Orgs. Antitrust Litig.*,
 13 203 F.3d 1322 (Fed. Cir. 2000), in which the Federal Circuit ruled that exercising
 14 legitimate patent rights can never support anti-trust liability. That argument is not
 15 well-taken; Plaintiffs’ claims arise under the Sherman Act, not federal patent law,
 16 and Ninth Circuit precedent applies. . . . *Image Technical* is binding on this
 17 Court.

18 Order Granting Rule 56(f) Motion, at 7. In its Renewed Motion for Summary Judgment, Abbott
 19 seemingly promised to stop making the argument that Federal Circuit law applied. “Thus, as it
 20 has argued in the past, Abbott respectfully contends that the Court should follow *Independent*
 21 *Services* and reject the Ninth Circuit’s approach in *Kodak*. Abbott understands that this Court
 22 already rejected that argument when ruling on Plaintiffs’ Rule 56(f) motion.” Request for Judicial
 23 Notice, Ex. 2, at 19 n.2.

24 The patent laws are equally irrelevant to the newly-filed Norvir cases. These plaintiffs
 25 allege Sherman Act and state law claims; although some of the complaints use the terms “patent”
 26

27 ⁸ These new allegations also bolster plaintiffs’ claim that Abbott lacked valid business
 28 reasons for its conduct and that its proffered explanations are pretextual. They make even stronger
 the Court’s earlier conclusion that plaintiffs have alleged and put forward evidence of a *Kodak*
 monopoly leveraging claim that rebuts any presumption of legitimacy.

1 or “intellectual property” a few times, it is Abbott which is attempting to inject patent issues into
 2 this case through an as-of-yet unasserted defense. But, assertion of a patent law defense does not
 3 mean Federal Circuit jurisdiction applies. The Supreme Court and the Federal Circuit have both
 4 clearly stated that “a case raising a federal patent-law defense does not, for that reason alone,
 5 ‘arise under’ patent law, ‘even if the defense is anticipated in the plaintiff’s complaint’....”
 6 *Leatherman Tool Group Inc. v. Cooper Indus. Inc.*, 131 F.3d 1011, 1013 (Fed. Cir. 1997) (quoting
 7 *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988)). In *Leatherman Tool*
 8 *Group*, the Federal Circuit held that it lacked jurisdiction over an appeal of an injunction entered
 9 in a trade dress infringement claim where the defendant had asserted an affirmative defense and
 10 counterclaim based on the patent laws. 131 F.3d at 1015.

11 Indeed, the Supreme Court in *Holmes Group, Inc. v. Vornado Air Circulation Systems,*
 12 *Inc.*, 535 U.S. 826, 830 (2002) – the case upon which Abbott bases its claim that Federal Circuit
 13 law applies here – reached the same conclusion. It held the Federal Circuit lacked jurisdiction
 14 over a declaratory judgment action in which the plaintiff pleaded trade dress claims and the
 15 defendant pleaded compulsory counterclaims of *patent infringement. Id.*

16 Relying on *Holmes*, the Federal Circuit in *Telecomm Tech. Servs., Inc. v. Siemens Rolm*
 17 *Commc’ns, Inc.*, 295 F.3d 1249 (Fed. Cir. 2002), declined jurisdiction to consider a defense to
 18 monopolization claims identical to the one Abbott suggests it will raise here. There, plaintiffs,
 19 independent service organizations, brought monopolization claims in the Northern District of
 20 Georgia, alleging that “by refusing to sell them parts unique to its machines [the defendant] is
 21 unlawfully leveraging its market share in the parts foremarket to monopolize the aftermarket of
 22 service.” *Telecomm Tech. Servs., Inc. v. Siemens Rolm Commc’ns, Inc.*, 150 F. Supp. 2d 1365,
 23 1367 (N.D. Ga. 2000). The defendant moved for summary judgment on the antitrust claims. *Id.*
 24 The district court initially denied summary judgment, ruling, *inter alia*, that “the fact that
 25 intellectual property rights attach to a work will not standing alone permit the right-holder to
 26 refuse to deal that good in an aftermarket.” *Id.* The defendant moved for reconsideration
 27 following the Federal Circuit’s ruling in *Independent Services, id.* at 1367-68, which Abbott here
 28 attempts to apply. The district court, assuming that the Federal Circuit would have jurisdiction

1 over any appeal in that case, applied the *Independent Services* holding and granted defendant
 2 summary judgment. *Id.* at 1368-69, 1373-74. Plaintiff ISOs appealed to the Federal Circuit,
 3 which rejected jurisdiction on the basis that the intervening *Holmes* decision divested it of
 4 jurisdiction it purportedly had by virtue of the patent counterclaims. 295 F.3d at 1252. In the
 5 absence of jurisdiction over the patent counterclaims, the Federal Circuit had no other basis for
 6 jurisdiction; the court did not retain jurisdiction by virtue of the patent immunity defense to the
 7 antitrust claims. It transferred the case to the Eleventh Circuit. *Id.* Federal Circuit jurisdiction is
 8 similarly lacking here.⁹

9 **III. THE NEWLY-FILED CASES ALLEGE ADDITIONAL ANTICOMPETITIVE**
 10 **CONDUCT THAT INDEPENDENTLY REQUIRES DENIAL OF ABBOTT'S**
 11 **MOTION TO DISMISS.**

12 Abbott's motion also should be denied because the new complaints allege facts that give
 13 rise to theories of exclusionary conduct not alleged in the earlier cases – none of which can even
 14 plausibly be said to require a finding of below-cost pricing. The newly-filed complaints state
 15

16 ⁹ In any case, GSK's and Meijer's complaints allege that Abbott licensed to GSK and
 17 others whatever right it had – illusory, real, big or small – to exclude GSK and other licensees
 18 from the boosted market. GSK Complaint ¶¶ 20-22; Meijer Consolidated Amended Complaint
 19 ¶¶ 15, 34-35. By virtue of the license, Abbott gave up any right it may have had to exclude its
 20 competitors from the boosted market, however those rights are defined. *Jacobs v. Nintendo of*
 21 *Am., Inc.*, 370 F.3d 1097, 1101 (Fed. Cir. 2004). In *Jacobs*, the patent owner settled patent
 22 infringement litigation by licensing its patent to the defendant. *Id.* at 1098-99. Later, the patent
 23 holder sued Nintendo, a customer of the licensee, alleging infringement. *Id.* at 1099. Nintendo
 24 argued that the license between the patent owner and the licensee protected not only the licensee
 25 but also the licensee's customers for making and selling devices that incorporate the licensed
 26 components. *Id.* Summary judgment for Nintendo was entered and affirmed. *Id.* at 1099, 1102.
 27 "For the [patentee] to bar [its licensee's] customer, Nintendo, from using [the licensee's]
 28 accelerometers in the products expressly referred to in the settlement agreement [the license], the
 court concluded, would undermine the provision of the agreement permitting the sale of
 accelerometers 'for use in tilt-sensitive control boxes.' The court explained that [the patentee]
 should not be permitted to do 'through the back door – by suing a customer of [the licensee] –
 what he cannot do through the front door,' i.e., by suing [the licensee]." *Id.* at 1099; *see also id.* at
 1101-02.

Here, Abbott expressly granted GSK and others the right to compete in the boosted PI
 market. It cannot now argue that it retained the ability to interfere with those rights. Whatever
 rights to exclude Abbott may once have had were relinquished with the license and cannot be
 summoned up by Abbott as immunity from the antitrust laws. *See Anton/Bauer, Inc. v. PAG, Ltd.*,
 329 F.3d 1343, 1350 (Fed. Cir. 2003) ("[I]t is well settled that all or part of a patentee's right to
 exclude others from making, using, or selling a patented invention may be waived by granting a
 license, which may be express or implied.").

1 claims under cases decided by the Supreme Court and other cases in which there is relative
 2 uniformity among the Circuits. Thus, even if *Kodak* were not to apply for one of the various
 3 reasons asserted, dismissal of the newly-filed cases would be inappropriate.

4 GSK's, Rite Aid's, and the Meijer Consolidated complaints contain a series of allegations
 5 that allow a trier of fact to conclude that, when Abbott quintupled the price of Norvir in 2003, it
 6 committed misconduct that was not only anticompetitive under *Kodak* (leveraging with dangerous
 7 probability of monopoly, without legitimate business justification), but also was anticompetitive
 8 under a number of other independent cognizable antitrust theories, including that Abbott changed
 9 a voluntary and profitable course of dealing for the purpose of hindering competition and that
 10 Abbott deceived industry participants into adopting its boosting agent as a standard and then
 11 refused to offer it on terms upon which the industry had relied. In support of these additional
 12 theories of liability, plaintiffs allege that:

- 13 • "Abbott's executives were well-aware that Abbott had facilitated the use of Norvir as a
 14 booster and caused its competitors to rely on the availability of Norvir -- through
 15 Abbott's past course of conduct and formally through licensing its competitors to
 16 promote their PIs with Norvir." Rite Aid Complaint ¶ 21; *see* Meijer Consolidated
 17 Amended Complaint ¶ 25; GSK Complaint, ¶¶ 16-20.
- 18 • "Abbott induced competitors in the boosted market to rely on Norvir." Rite Aid
 19 Complaint ¶ 42; *see also* Meijer Consolidated Amended Complaint ¶¶ 35-36.
- 20 • "[I]n reliance on the expectation that Abbott would act in good-faith, and because
 21 Abbott concealed its strategy to reduce Norvir's availability and/or dramatically raise
 22 its prices, GSK and other PI manufacturers materially delayed developing, testing,
 23 and/or launching other potential Boosted-PIs that could be effective with substantially
 24 less Norvir (and thus be less susceptible to impairment by a Norvir price increase) or
 25 could be used with another PI-Boosting drug entirely, *i.e.*, not Norvir. As a result of
 26 Abbott's conduct, no currently available PI has been approved for co-administration
 27 with any other PI-Boosting drug besides Norvir." Meijer Consolidated Amended
 28 Complaint ¶ 36.

- 1 • “Abbott’s exclusionary conduct has unlawfully caused the Boosted Market to
2 standardize on Norvir for boosting purposes and has significantly retarded the advent
3 of alternatives to Norvir in the United States, thereby enabling Abbott to sell Norvir at
4 artificially inflated prices.” *Id.* ¶ 38.
- 5 • “At the very same time that Abbott was planning to limit Norvir’s availability (by
6 either physically removing it from the market or raising its price to make it effectively
7 unavailable), Abbott was approaching BMS, GSK, and other actual and potential
8 Boosted-PI competitors to induce them to take licenses from Abbott....” *Id.* ¶ 34.
- 9 • Abbott “chose to profit” by encouraging the development of PIs boosted with Norvir
10 and, thus, sales of Norvir. *See* GSK Complaint ¶ 17.
- 11 • This course of dealing culminated in an express license agreement with GSK (and
12 others) granting GSK the right to market PIs to be co-administered with Norvir. GSK
13 Complaint ¶¶ 2, 20-23; *see also* Meijer Consolidated Amended Complaint ¶ 34.
- 14 • “Abbott never disclosed to GSK and other licensees and potential licensees that Abbott
15 might either remove Norvir from the market or raise its price to make it financially
16 unavailable to many patients.” Meijer Consolidated Amended Complaint ¶ 35.
- 17 • “When GSK entered into the Norvir license with Abbott in December 2002, GSK
18 relied on Abbott’s good faith not to materially deviate from its prior course of conduct
19 with regard to selling and pricing Norvir.” *Id.*
- 20 • “Upon entering into the agreement, Abbott was bound to act in good faith to ensure
21 that Norvir remained on the market for co-administration with GSK PIs, as it had done
22 in its previous course of dealings. Without the continued reasonable availability of
23 Norvir, the agreement would be illusory – GSK would have paid Abbott for nothing.”
24 GSK Complaint ¶ 23.
- 25 • “After December 2003, Abbott’s Boosted-PI competitors knew that any price
26 reductions they took could immediately be undercut by further Norvir price
27 *increases*. . . . Consequently, the December 2003 Norvir price increase not only raised
28 the costs of using rivals’ products, but also reduced the overall degree of price

1 competition in the Boosted Market, thereby further reducing competitive pressure on
 2 Abbott to reduce Kaletra's prices." Meijer Consolidated Amended Complaint ¶ 40
 3 (emphasis in original).

4 The newly-filed complaints allege conduct that is uniformly condemned as anticompetitive
 5 regardless of whether plaintiffs can prove monopoly leveraging under *Kodak*. Abbott misled its
 6 competitors into developing PI regimens based on Norvir as a booster, and then refused to make
 7 Norvir available to AIDS patients on reasonable terms. These allegations state a claim for
 8 anticompetitive conduct under section 2. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297
 9 (3d Cir. 2007); *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001); *In re*
 10 *Rambus, Inc.*, No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006); *In re Dell Computer Corp.*,
 11 121 F.T.C. 616 (1996). Abbott's abandonment of a prior, voluntary, and profitable course of
 12 dealing for the purpose of reducing competition makes Abbott's conduct actionable under the
 13 *Aspen Skiing* line of cases.¹⁰ *See Verizon Commc'ns., Inc., v. Law Offices of Curtis V. Trinko,*
 14 *LLP*, 540 U.S. 398, 409 (2004); *Aspen Skiing*, 472 U.S. 585; *see, e.g., Tucker v. Apple Computer,*
 15 *Inc.*, 493 F. Supp. 2d 1090, 1098-1101, 1101 (N.D. Cal. 2006) ("Plaintiff has alleged facts that, if
 16 proven, could establish that Apple was acting with 'anticompetitive malice' rather than
 17 'competitive zeal' within the meaning of *Trinko* and *Aspen Skiing*."). Abbott's motion to dismiss
 18 ignores these additional allegations of exclusionary conduct and, therefore, should be denied.

19 **IV. CONCLUSION**

20 This Court is not being asked on this motion whether Abbott's "behavior has any
 21 procompetitive effects and, if so, whether they outweigh the anticompetitive effects." *See*
 22 *Eastman Kodak*, 504 U.S. at 479. The question posed by Abbott's motion is whether Abbott's
 23 conduct "appears always or almost always to enhance competition, and therefore to warrant a legal
 24 presumption without any evidence of its actual economic impact." *Id.* It does not. The conduct
 25 alleged here may or may not be held to be unlawful after a full airing has occurred – that is not the

26
 27
 28 ¹⁰ Abbott itself argued in its Motion for Summary Judgment that the *Aspen Skiing* test applies. Request for Judicial Notice, Ex. 2, at 15.

1 question today – but, it is not exempt from examination as Abbott asks this Court to hold. This is
2 not a case appropriately disposed of at the pleading stage.

3 For the foregoing reasons, plaintiffs ask this Court to deny Abbott's Motion to Dismiss.

4 Dated: February 14, 2008

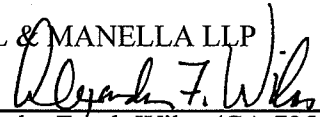
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21 Pursuant to General Order No. 45, Section X, I attest under penalty of perjury that concurrence
22 in this filing has been obtained from Alexander F. Wiles.

24 Dated: March 25, 2008

25 By: ____/s/ Trevor Stockinger____

26 Trevor Stockinger